Supreme Court, U.S.
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U.S.S.C. No.

87-24

IN THE SUPREME COURT OF THE

UNITED STATES OF AMERICA

LAWRENCE MOORE and WALTER F. WHELAN, JR.

Petitioners,

v.

BECHTEL POWER CORPORATION, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, UNION LOCAL 569, PAUL BLACKWOOD and WAYNE LOVIN,

Respondents.

PETITION FOR WRIT OF CERTIORARI

ON ORDER OF THE NINTH UNITED STATES CIRCUIT COURT OF APPEALS

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Attorney for Plaintiff-Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Appellate Court erred in dismissing the appeal below on the basis that Plaintiffs failed to serve their complaint within the six months statute of limitations found in §10(b) of the National Labor Relations Act 29 U.S.C. §160(b), thus failing to consider the substantive merits of the appeal.

PARTIES TO THE PROCEEDING IN WHOSE COURT THE JUDGMENT IS SOUGHT TO BE REVIEWED

All names are contained in the caption to this case.

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Cert. Granted 54 U.S.
Law Week 3859 U.S.S.C.
Doc. 85-1804
Reversed 55 U.S.L.W. 4466. 12 & 13

CITATIONS

Opinion of the United States Court of Appeals for the Ninth Circuit attached as Exhibit A of the Appendix. The judgment of the United States District Court for the Southern District of California attached as Exhibit B of the Appendix.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this matter pursuant to 29 U.S.C. §185, 28 U.S.C. §1331, 28 U.S.C. §1291, Federal Rule of Appellate Procedure 4(a) and Rule 17 of the Rules of this Court.

STATUTES INVOLVED IN THIS CASE

Section 10 of the National Labor Relations Act, 29 U.S.C. §160(b):

> Whenever it is charged that any person has engaged in or is in engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be

served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed not less than five days after serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of the copy thereof upon the person against whom such charges may, unless the person aggrieved thereby was prevented from filing such charges by reason of service in the Armed Forces, in which event the six month period shall be computed from the day of his discharge. Any complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as applicable, be conducted in accordance with the rules of evidence applicable in the District Courts of the United States under the Rules of Civil Procedure for the District Courts of the United States adopted by the Supreme Court of the United States pursuant to §2072 of Title 28, United States Code.

§301 OF THE LABOR MANAGEMENT RELATIONS ACT,
29 U.S.C. §185 301(A)

Suits for violation of contracts between an employer and labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such orginizations, may be brought into any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

On November 10, 1983, Plaintiffs filed a complaint alleging breach of contract by Defendant BECHTEL POWER CORPORATION ("BECHTEL") and breach of the duty of fair representation by Defendants INTERNATIONAL BROTHERHOOD OF

ELECTRICAL WORKERS, LOCAL 569, PAUL BLACKWOOD and WAYNE LOVIN (collectively referred to as "UNION"). An amended complaint was filed on April 9, 1984 and served on April 24, 1984.

On May 11, 1984, Defendants LOCAL 569, BLACKWOOD and LOVIN filed their answer to the amended complaint. Defendant BECHTEL filed its answer on June 15, 1984.

On September 19, 1986, the United States District Court for the Southern District of California entered an order granting motions for summary judgment brought by all the Defendants. (Appendix, Exhibit A)

Plaintiffs filed a timely notice of appeal with the Ninth United States Circuit Court on October 10, 1985. On March 19, 1985, Appellants moved for a stay of the appeal proceedings and for

an extension of time to file the Opening Brief. Those motions were brought in light of the recent Ninth Circuit case of Gallon v. Levin Metals Corp., 779 F. 2d 1439 (9th Cir. 1986), cert. filed 54 U.S.L.W. 3763, which decision would have required dismissal of the appeal. Appellants sought the stay in the hope that Gallon, supra, would ultimately be reviewed by this Court. On March 28, 1986, a sixty day stay was granted.

Briefs were ultimately filed regarding the substantive issues on appeal, but the Circuit Court denied the appeal on January 7, 1987 based on Gallon v. Levin Metals, Supra. Petitioners herein seek review of this order by timely filing of this petition.

SUMMARY OF ARGUMENT

Petitioner contends that §10(b) of the National Labor Relations Act, as applied by the case of Delcostello v. International Brotherhood of Teamsters, 463 US 151 (1983), is applicable to actions arising under §301 of the Labor Management Relations Act only insofar as it provides a statute of limitations for filing a complaint. Since it is a borrowed statute of limitations, rules regarding service of a complaint shall be governed by Federal Rule of Civil Procedure 4(a) and (j). This argument was recently adopted by this Court in West v. Conrail 780 F. 2d 361 (3d Cir. 1985), Cert. Granted 54 U.S.L.W. 3859, Reversed 55 U.S.L.W. 4466 (April 6, 1987) U.S.S.C. Doc. 85-1804. Petitioners pray that this case be considered and summarily reversed

accordingly.

ARGUMENT

The sole issue raised by this petition has already been decided in West v. Conrail, supra. Petitioners first attempted to timely file this petition on April 7, 1987. West v. Conrail, supra was decided by the Court on April 6, 1987.

Petitioners had wished to be considered within the class of cases to be affected by this Court's ruling in West, supra. Unbeknownst at time of filing, the issue was already decided. Petitioners must have this Petition accepted in order to preserve their rights.

The arguments in support of overturning this decision need not be argued here. They have already been accepted by the Court. Peititioners did not

obtain a ruling on the merits of their appeal in the Ninth Circuit based on that Court's reliance on a case improperly decided. They could not seek rehearing since there were no new issues of law to be raised a that time. At this time however, there is new law, or at lease a clarification of old law that had been misinterpreted by the Appellate Court. This Court can provide Petitioners their only remedy. They therefore pray that this petition be accepted and that the case be reversed and remanded to the Ninth Circuit.

CONCLUSION

Petitioners pray that this Court consider this petition, review the Order of the Ninth Circuit, reverse said Order and remand the case back to that Court for a ruling on the merits.

DATED: 5-18-87

George L. de la Flor

SUPREME COURT AFFADAVIT OF SERVICE

I, George L. de la Flor declare:

1. I am a member of the bar of this Court;

2. On May 22, 1987 I placed A PETITION FOR WRIT OF CERTIORARI and APPENDIX, in the matter of MOORE, et al. v. BECHTEL POWER CORPORATION, et al. in shipping containers addressed as follows:

DONALD A. NEWMAN, ESQ.
THELEN, MARIN, JOHNSON & BRIDGES
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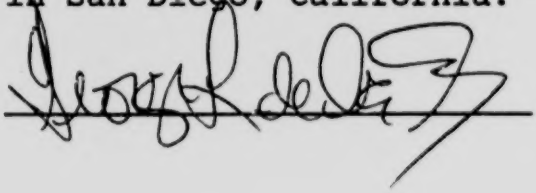
CLERK
UNITED STATES SUPREME COURT
Washington, D.C., 29543

and deposited them in the United States Mail at San Diego, California, with first class postage fully prepaid thereon.

I declare under penalty of perjury that the foregoing is true and correct and that it is executed this 21st day of May 1987, in San Diego, California.



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U.S.S.C. No. 87-24

Ninth Circuit,
U.S.C.A. No. 85-6320

Southern District of California,
U.S.D.C. No. CV-83-2306-LCN

IN THE SUPREME COURT OF THE

UNITED STATES OF AMERICA

LAWRENCE MOORE and WALTER F. WHELAN, JR.

Plaintiff-Petitioners,

v.

BECHTEL POWER CORPORATION, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, UNION LOCAL 569, PAUL BLACKWOOD and WAYNE LOVIN,

Defendant-Respondents.

APPENDIX TO WRIT OF CERTIORARI

ON ORDER OF THE NINTH UNITED STATES CIRCUIT COURT OF APPEALS

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APPENDIX

Exhibit A
Appellate Court Order 1
(Ninth U. S. Circuit)

Exhibit B
Trial Court Order 4
(Southern District of California)

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE MOORE and WALTER F. WHELAN, JR.,	)
Plaintiffs-Appellants,	)
v.	)
BECHTEL POWER CORPORATION, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS and LOCAL 569, PAUL BLACKWOOD, and WAYNE LOVIN,	)
Defendants-Appellees.	)

No. 85-6320
DC# CV 83-2306-LCN
ORDER*

Appeal from the United States District Court for the Southern Distict of California Leland C. Nielsen, District Judge, Presiding Argued and Submitted December 4, 1986 Pasadena, California

EXHIBIT A

Before: SNEED and SCHROEDER, Circuit Judges, and MARQUES, ** District Judge.

We have previously held that the six-month service requirement, as well as the six-month statute of limitations, found in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), applies to a hybrid action brought under section 301 of the Labor Management Relations Act, 29 U.S.C. §185 et seq. Gallon v. Lenin Metals Corp., 779 F.2d 1439, 1441 (9th Cir. 1986), petition for cert. filed, 54 U.S.L.W. 3763 (U.S. May 7, 1986) (No. 85-1839). Plaintiffs Lawrence Moore and Walter Whelan brought this hybrid action against defendants Bechtel Power Corporation and International Brotherhood of Electrical Workers, Union Local 569, alleging violation of the collective bargaining agrement and the union's breach of its duty of fair representation. The record

below reveals that no complaint was served on any of the defendants within six months of the action's accural. Therefore, the plaintiffs' causes of action are time barred. The summary judgment granted defendants in this case is affirmed.

---

* This disposition is not approprate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

**Honorable Alfredo Marquez, United States District Judge for the District of Arizona, sitting by designation.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

LAWRENCE MOORE and WALTER F. WHELAN, JR.,	)
Plaintiffs,	)
v.	)
BECHTEL POWER CORPORATION, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS and LOCAL 569, PAUL BLACKWOOD, and WAYNE LOVIN,	)
Defendants.	)

Civil No. 83-2306-N(CM)
ORDER:
1) GRANTING DEFENDANTS BECHTEL and LOCAL 569's MOTIONS FOR SUMMARY JUDGMENT;
2) DISMISSING THIRD CAUSE OF ACTION;
3) DENYING MOTION TO RE-OPEN DISCOVERY; and
4) DENYING MOTION FOR JURY TRIAL

EXHIBIT B

This matter came before the Court on August 12, 1985, for hearing on Defendants' motions for summary judgment and Defendant Bechtel Power Corporation appeared by Donald A. Newman of Thelen, Marrin, Johnson & Bridges. Defendants Local 569, Paul Blackwood, and Wayne Lovin appeared by Herbert M. Ansell of Levy, Ansell & Goldman. Plaintiffs appeared by George L. de la Flor. Upon consideration of the arguments of counsel, and the moving and opposing papers, this Court renders the following decisions:

I

Local 569's motion for summary judgment is GRANTED. When a union and an employer agree that disputes arising under a collective bargaining agreement will be settled in a particular way, an employee's grievance is entrusted to the

judgment and discretion of the union of which he is a member. Only if the union shows reckless disregard for the employee's rights as a member of the collective bargaining unit will the union have breached its duty of fair representation. Castelli v. Douglas Aircraft Co., 752 F.2d 1480, 1482-83 (9th Cir. 1985). In this case, interpreting the record in the light most favorable to Plaintiffs, this Court concludes that Local 569 representation was adequate, given the merits of the termination grievances.

Plaintiffs Moore and Whelan are experienced journeyman electricians who accepted job referrals to Bechtel Power Corporation at the San Onofre Nuclear Generating Station (SONGS) in July of 1982, knowing that SONGS was an operating nuclear facility. Both Plaintiffs re-

ceived and acknowledged written warnings from the Local and from Bechtel that they may be required to work in radiation areas. Both Plaintiffs underwent radiation school training. Yet, when assigned to areas where low-level radiation was present, both Plaintiffs refused the work assignments.

Following Plaintiffs' terminations, Local 569 represented the pair up through Step 3 of the grievance procedure, as provided in the relevant collective bargaining agreement. Although investigation was minimal, it was as thorough as required by the case. Castelli, 752 F.2d at 1483. The record reveals that International Representative Kenneth Johnson presented several arguments on behalf of the Plaintiffs, and that the relationship between Local 569 and the employer was advesarial as to the issue

of the terminations. When the Presidents' Committee determined that the discharges were within the employer's "management rights" under the collective bargaining agreement, the union's representation was contractually at an end. This Court finds nothing in the record to rise to an "egregious disregard" for Moore's or Whelan's rights. Id.

II

Bechtel Power Corporation's motion for summary judgment is also GRANTED. Absent a genuine issue of material fact on the issue whether Local 569 breached its duty of fair representation, Plaintiffs are not entitled to proceed with their action against the employer. See, e.g., Franklin v. Southern Pac. Transp. Co., 593 F.2d 899, 901 (9th (sic) Cir. 1979).

III

Plaintiffs' third cause of action, charging Defendants Paul Blackwood and Wayne Lovin with the improper collection of a one (1%) "work tax" is DISMISSED, without prejudice, for failure to exhaust internal union appeals procedures. This Court finds that the IBEW Constitution provides an adequate internal procedure for pursuing claims of misconduct against local union leadership, and that Plaintiffs have not shown that appeals to the International Vice President, the International President, the International Executive Council, and the International Convention would be futile. See Scoggins v. Boeing Co., Inc., 742 F.2d 1225, 1229-30 (9th Cir. 1984). The interpretation and application of a union's By-Laws and Constitution are best left, in the first instance, to union

officials.

IV

Finally, Plaintiff's motions for jury trial and to re-open discovery are DENIED as moot.

IT IS SO ORDERED.

Dated: September 6, 1985

LELAND C. NIELSEN,
United States District Judge

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No. 87-24

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

LAWRENCE MOORE and
WALTER F. WHELAN, JR.,

Plaintiffs-Petitioners,

vs.

BECHTEL POWER CORPORATION, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, UNION LOCAL 569, PAUL BLACKWOOD and WAYNE LOVIN,

Defendants-Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Ninth Circuit erred in affirming the summary judgment granted defendant-respondents by the District Court below on the basis that plaintiff-petitioners' claims were barred in accordance with the six month statute of limitations found in Section 10(b) of the National Labor Relations Act, 29 U.S.C. section 160(b), in that the complaint was not served within six months after the accrual of plaintiff-petitioners' claims, without reaching and making a determination upon the substantive grounds relied upon by the District Court below in granting summary judgment.

2. Whether, if this Court elects to review the entire record on appeal, the summary judgment rendered by the District Court below should be affirmed on the grounds relied upon by that Court.

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

The names of the parties to this proceeding are those contained in the caption of this case. In addition, during the time period material to this case, Bechtel Power Corporation was a wholly owned subsidiary of Bechtel Group, Inc. and a member of the Bechtel Group of Companies.

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No. 87-24

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

LAWRENCE MOORE and WALTER F. WHELAN, JR. Plaintiff-Petitioners,	)
v.	)
BECHTEL POWER CORPORATION, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, UNION LOCAL 569, PAUL BLACKWOOD and WAYNE LOVIN, Defendant-Respondents.	)

RESPONDENTS BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

On or about November 10, 1983, plaintiff-petitioners filed a complaint in the United States District Court for the Southern District of California against their former employer, Bechtel Power Corporation ("Bechtel"), and their union, International Brotherhood of Electrical Workers, Union Local 569 ("Local 569" or "Union"). This complaint was never served.

On or about April 9, 1984, plaintiff-petitioners filed an amended complaint, adding a claim against Paul Blackwood and Wayne Lovin and adding the International Brotherhood of Electrical Workers to the caption

only. The amended complaint was served on the parties on or about April 24, 1984. The International Union was subsequently dismissed from the action.

Plaintiff-petitioners' claims against Bechtel were brought under section 301 of the Labor Management Relations Act, 29 U.S.C. section 185. Each plaintiff claimed that Bechtel had terminated his employment in August 1982 without just cause and, therefore, in breach of the operative collective bargaining unit. Each plaintiff further contended that Local 569 and Paul Blackwood and Wayne Lovin had breached their respective duties of fair representation, the former in failing to properly represent him in

the ensuing grievance procedure, and Messrs. Blackwood and Lovin by their conduct with respect to the procedures utilized in adopting an internal union dues increase.

After conducting discovery, defendant-respondents brought motions for summary judgment with respect to the respective claims asserted against them by plaintiff-petitioners.

On or about September 6, 1985, the United States District Court for the Southern District of California, the Honorable Leland C. Nielsen, Judge presiding, granted the motions for summary judgment by defendant-respondents Bechtel and Local 569 on the grounds that the Union had not breached its duty of fair

representation and, therefore, that as a matter of law, said defendant-respondents were entitled to judgment. The claims against Messrs. Blackwood and Lovin were dismissed without prejudice for failure by the plaintiff-petitioners to exhaust internal union remedies. [See Exhibit "B" to Plaintiff-Petitioners' Appendix to the Petition for Writ of Certiorari.]

Plaintiff-petitioners thereafter filed a timely notice of appeal with the Ninth Circuit Court of Appeals. On December 4, 1986, the Ninth Circuit Court of Appeals heard oral argument both with respect to (1) whether the District Court had properly granted summary judgment to defendant-

respondents Bechtel and Local 569 on the grounds that there was no genuine issue of material fact on the issue of whether Local 569 had breached its duty of fair representation and that, as a matter of law, said defendant-respondents were entitled to judgment and (2) whether plaintiff-petitioners' claims against Bechtel and Local 569 were barred under the applicable statute of limitations.

On or about January 7, 1987, the Ninth Circuit Court of Appeals issued an order which affirmed the summary judgment granted by the District Court below. In affirming the summary judgment, the Ninth Circuit Court of Appeals relied entirely on the grounds

that plaintiff-petitioners' claim was time barred in accordance with its holding in Gallon v. Levin Metals Corp., 779 F.2d 1439 (9th Cir. 1986) rev'd. sub. nom. ____ U.S. _____, 95 L.Ed.2d 489, ____ S.Ct. ____ (1987), that the six-month service requirement found in section 10(b) of the National Labor Relations Act, 29 U.S.C. section 160(b), was applicable to a hybrid action brought under section 301 of the Labor Management Relations Act, 29 U.S.C. section 185. It was uncontested in this action that plaintiff-petitioners had failed to serve their complaint within six months of the accrual of their claims.

Plaintiff-petitioners then filed this petition for writ of certiorari

to review the decision of the Ninth Circuit Court of Appeals.

ARGUMENT

Defendant-respondents maintain that the District Court below correctly granted their motions for summary judgment for the reasons relied upon in its decision.

Defendant-respondents do not dispute, however, that the grounds relied upon by the Ninth Circuit Court of Appeals in affirming the District Court's grant of summary judgment have been rejected by this Court in West v. Conrail, 481 U.S. _____, 95 L.Ed.2d 32, 107 S.Ct. _____, (1987) and cannot constitute valid grounds upon which the summary judgment granted by the

District Court may rest.

On this basis, plaintiff-petitioners have requested that this Court reverse the order of the Ninth Circuit Court of Appeals and remand the case to that Court for it to rule on the substantive merits, i.e., whether the District Court had properly granted summary judgment to defendant- respondents Bechtel and Local 569 on the grounds that there was no genuine issue of material fact on the issue of whether Local 569 had breached its duty of fair representation and that, as a matter of law, said defendant-respondents were entitled to judgment. Defendant-respondents accept that this Court may, in its discretion, reverse

the order of the Ninth Circuit Court of Appeals and remand this case to that Court with such instructions.

However, since in this case, in contrast to West v. Conrail and Gallon v. Levin Metals Corporation, the District Court granted summary judgment not on the basis of a failure to serve the complaint within six months of the accrual of the claims but on the grounds that there was no genuine issue of material fact with respect to Local 569's satisfactory discharge of its duty of fair representation, this Court may rather elect to review the entire record on appeal to determine whether the judgment rendered by the District Court below should be affirmed on the

grounds relied upon by that Court.

Should this Court elect to proceed in this latter manner, defendant-respondents stand ready to comply with any such order of this Court and request an opportunity to fully brief the issue relied upon by the District Court below.

CONCLUSION

Defendant-respondents maintain that the District Court below correctly granted their motions for summary judgment for the reasons relied upon in its decision.

Should this Court elect to review the entire record on appeal to determine whether the judgment rendered by the District Court below

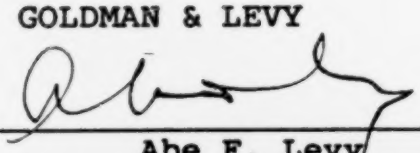
should be affirmed on the grounds relied upon by that Court, defendant-respondents stand ready to comply with any such order of this Court and request an opportunity to fully brief the issue relied upon by the District Court below.

If this Court elects instead to reverse the order of the Ninth Circuit Court of Appeals, defendant-respondents request that the case be remanded to that Court for it to determine whether the judgment rendered by the District Court below

should be affirmed on the grounds relied upon by that Court.

Respectfully submitted,

LEVY, GOLDMAN & LEVY

By 

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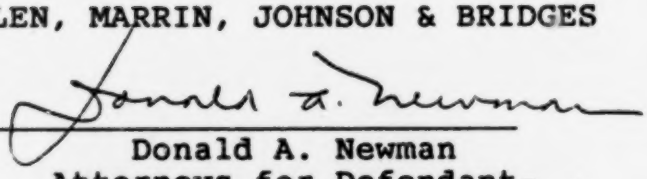
By 

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